IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 05-1008

CTIA – THE WIRELESS ASSOCIATION,

PETITIONER

V.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

The parties, intervenors, and amici are listed in the brief of petitioner.

B. Rulings Under Review

Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 20 FCC Rcd 1073 (2004) (JA 43)

C. Related Cases

The order on review has not previously been before this Court. Counsel are not aware of any related cases pending in this or any other Court.

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GLOSSARY

ACHP	Advisory Council on Historic Preservation
APE	area of potential effects
Conference	National Conference of State Historic Preservation Officers
National Register	National Register of Historic Places
NHO	Native Hawaiian Organization
NHPA	National Historic Preservation Act
NPA	Nationwide Programmatic Agreement
R&O	*Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, 20 FCC Rcd 1073 (2004) (JA 43).
SHPO	State Historic Preservation Officer
THPO	Tribal Historic Preservation Officer

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BRIEF FOR RESPONDENTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether construction of towers and associated antennas serving FCC licensed radio transmitting stations is a "federal undertaking" within the meaning of Section 106 of the National Historic Preservation Act.

2. Whether the Commission was reasonable in deferring to the Advisory Council on Historic Preservation rule that the phrase historic properties "eligible for inclusion in the National Register" contained in Section 106 of the National Historic Preservation Act

includes any property that meets the eligibility criteria established in that act and in the Secretary of the Interior's implementing regulations for inclusion on the National Register.

3. Whether the doctrine of issue preclusion bars CTIA from relitigating the question of whether the phrase historic properties "eligible for inclusion in the National Register" refers to properties that meet the eligibility criteria.

JURISDICTION

The Court has jurisdiction pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Appendix to this brief.

COUNTERSTATEMENT OF THE CASE

The National Historic Preservation Act ("NHPA") requires that federal agencies take into account the effects of their undertakings, or undertakings that they fund or license, on historic properties and provide the Advisory Council on Historic Preservation ("ACHP") a reasonable opportunity to comment on such undertakings. FCC rules for more than thirty years have required an applicant or a licensee to file an environmental assessment when, in addition to other types of environmental impact, a proposed undertaking such as an antenna tower construction may have a significant effect on historic properties. ACHP's rules contain more detailed requirements. The ACHP rules also permit it and the agencies to negotiate specially tailored programmatic agreements to govern this process.

Following an extended period of consultation, including a notice and comment rule making proceeding, the Commission, the ACHP and the National Conference of State Historic Preservation Officers executed a Nationwide Programmatic Agreement governing the NHPA review process for radio communications tower construction and other Commission undertakings. In an October 2004 *Report and Order* that is the subject of the petition for review in this case, the Commission amended its rules to implement that agreement. The Commission found that the Nationwide Agreement would more efficiently tailor the review required under the NHPA to the communications context and would thereby improve compliance and streamline the review process. Consistent with its long-established approach, the revised rules implementing the Agreement continue to require applicants and licensees to consider the effect of tower construction on historic properties prior to construction.

COUNTERSTATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY FRAMEWORK

A. The National Historic Preservation Act

1. Federal Agency Responsibilities Under Section 106 of the National Historic Preservation Act, federal agencies must consider the effects of their "undertakings" on historic properties listed or eligible for listing in the National Register of Historic Places. 16 U.S.C. 470f. The NHPA defines an "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including … those requiring a Federal permit, license, or approval…." 16 U.S.C. 470w(7). The National Register, which is maintained by the Secretary of the Interior, is a list of properties that are deemed significant in American history, architecture, arche-

ology, engineering, and culture. 16 U.S.C. 470a(a). Section 106 is "universally interpreted" as procedural in nature; it does not preclude federal agency actions that adversely affect historic properties, but requires that an agency consider the effects of its undertakings on historic properties and that it afford the ACHP "a reasonable opportunity to comment with regard to such an undertaking." 16 U.S.C. 470f; *see Davis v. Latschar*, 202 F.3d 359, 370 (D.C.Cir.2000) (quoting *National Trust for Historic Preservation v. Blanck*, 938 F. Supp. 908, 918 (D.D.C. 1996)).

Section 106 applies to all federal agencies and is not tailored to any particular agency's circumstances or undertakings. A separate provision of the NHPA directs federal agencies, "[c]onsistent with [their] mission[s] and mandates," to "carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit or other federal approval is required) in accordance with the purposes of this Act." 16 U.S.C. 470h-2(d).

2. The Advisory Council on Historic Preservation The ACHP, created under the NHPA, is an independent federal agency with 20 members from the public and private sectors. The ACHP's members include six federal agency heads (including the Secretaries of the Interior and Agriculture); the chairman of the National Trust for Historic Preservation; the president of the National Conference of State Historic Preservation Officers; four historic preservation experts; the Architect of the Capitol; a governor; a mayor; a member of an Indian tribe or Native Hawaiian organization; and four members of the general public. The ACHP employs a professional staff trained in historic preservation. *See* 16 U.S.C. 470i(a).

Section 202 of the NHPA establishes certain functions of the ACHP, directing it, among other things, to review the policies and programs of federal agencies and to recommend methods for improving the effectiveness of agency historic preservation programs. 16 U.S.C. 470j(a). Section 211 of the NHPA authorizes the ACHP "to promulgate such rules and regulations as it deems necessary to govern the implementation of [section 106 of the NHPA] in its entirety." 16 U.S.C. 470s; *see National Mining Ass'n v. Slater*, 167 F.Supp. 2d 265, 281-84 (D.D.C. 2001), *rev'd on other grounds*, 324 F.3d 752 (D.C.Cir. 2003).

3. The Section 106 Process The ACHP's rules generally establish the process by which agencies are to consider the effects (if any) of their undertakings on historic properties and provide the ACHP a reasonable opportunity to comment. *See* 36 C.F.R. Part 800. This process is known as the "section 106 process." Under the ACHP's rules, if an agency finds that an undertaking has no potential to affect historic properties, it has no further obligations under Section 106. *See* 36 C.F.R. 800.3. Otherwise, the agency is responsible, in consultation with relevant state or tribal historic preservation officers, applicants and other parties for (1) identifying historic properties within a defined area, known as the undertaking's area of potential effects ("APE"); (2) assessing adverse effects, if any, of the undertaking on any such historic properties; and (3) resolving any adverse effects, typically by way of a memorandum of agreement, between the agency and the responsible state or tribal historic preservation officer and sometimes the ACHP. *See generally* 36 C.F.R. 800.3 – 800.6. The rules permit the agency to authorize applicants to initiate consultations with historic preservation officers, but the agency remains

legally responsible for all findings and determinations charged to the agency. 36 C.F.R. 800.2(a)(3), (c)(4).

4. Program Alternatives The ACHP's rules provide for a number of "program alternatives" by which regulatory agencies, in consultation with the ACHP, may develop customized procedures. For example, an agency may execute a special "programmatic agreement" that substitutes for the generally-applicable section 106 rules for a particular program or a class of undertakings whose effects on historic properties are similar or repetitive or "cannot be fully determined prior to approval" of the undertaking. 36 C.F.R. 800.14(b). These flexible procedures are designed to adapt the general section 106 process to an agency's specific needs. A programmatic agreement covers all future activities included within the category of undertakings it addresses and represents a binding agency obligation that "satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency." 36 C.F.R. 800.14(b)(2)(iii).

B. The Communications Act of 1934

Communications towers and other structures that support antennas are part of the infrastructure for services licensed by the FCC, including broadcast television and radio, cellular, Personal Communications Services ("PCS"), public safety systems and other advanced and emerging services. Most licenses and authorizations to provide communications services, including cellular and PCS licenses, are issued pursuant to section 301 of the Communications Act of 1934, as amended, which prohibits the use and operation of apparatuses for the transmission of energy by radio without a license obtained from the FCC. 47 U.S.C. 301.

A fundamental objective of the Communications Act is the deployment of a "rapid, efficient…wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. 151. Congress adopted even more explicit objectives when it amended the Communications Act in the Omnibus Budget Reconciliation Act of 1993, directing "the development and rapid deployment of new technologies, products and services for the benefit of the public…without administrative or judicial delays [, and] efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. 309(j)(3)(A), (D).

Complementing the fundamental requirement of Section 301 of the Act, 47 U.S.C. 301, to issue licenses for radio communications to qualified applicants, the Communications Act generally has required the FCC to issue a permit prior to construction of radio facilities such as antenna tower structures. 47 U.S.C. 319. However, consistent with amendments to that authority made in the early 1980s, the FCC has eliminated many of the former requirements associated with issuing permits for the construction of facilities for certain radio services. *See* 47 U.S.C. 319(d)(authorizing the FCC to continue requiring permits for construction of common carrier radio facilities if it finds such a requirement in the public interest).

Under FCC rules, many applicants now receive geographic licenses that allow them generally to operate radio transmission facilities within a specified geographic area, the number and location of which the FCC does not specifically approve when the licenses are issued. By reducing or eliminating some forms of regulation, including certain regulatory filings, geographic area licensing procedures serve the statutory objectives reflected in the Communications Act of expediting the provision of communications services to the public, and making available an efficient and effective nationwide

communications network. 47 U.S.C. 151; *see also* 47 U.S.C. 157 (directing the FCC to "encourage the provision of new technologies and services to the public"). Under this licensing procedure, the FCC in most cases does not become involved in the site-specific planning or construction of transmission facilities.

C. The FCC's Environmental and Historic Preservation Rules

The FCC first adopted rules implementing the National Environmental Policy Act in 1974. *See Implementation of the National Environmental Policy Act of 1969*, 49 F.C.C.2d 1313 (1974); *see also Amendment of Environmental Rules*, 60 Radio Reg.2d (P&F) 13 (1986); *Amendment of Environmental Rules*, 3 FCC Rcd 4986 (1988). Provisions of the Commission's environmental rules also relate to the agency's responsibilities regarding historic preservation under the NHPA. Specifically, the rules delineate the responsibilities of licensees and applicants and their interaction with the FCC in the section 106 process. *See generally* 47 C.F.R. 1.1301-1.1319 (NHPA or ACHP requirements are specifically referenced in 47 C.F.R. 1.1307(a)(4) & Note; 1.1308 & Note; 1.1311(b); and 1.1312).

With specific reference to the issues raised by petitioner in this case, the Commission amended its rules in 1990 to make clear that even in situations where it has exercised its authority under 47 U.S.C. 319(d) to permit construction of a radio communication facility without specific Commission construction authorization, the applicant or licensee must nevertheless determine prior to construction whether the facility may have a significant environmental effect, including an effect on historic properties. If the proposed facility may have such an effect, the applicant must file an Environmental Assessment as detailed in the Commission's rules and may not commence construction prior to Com-

mission authorization. *See Amendment of Environmental Rules*, 5 FCC Rcd 2942 (1990); *see also* 47 C.F.R. 1.1312 ("Facilities for which no preconstruction authorization is required."). No party sought judicial review of this order, and wireless licensees, including CTIA's members, have been performing historic reviews and filing environmental assessment in accordance with the terms of that rule in the ensuing years.

In addition, pursuant to the authority provided in 47 U.S.C. 303(q), Commission rules provide that radio towers meeting certain height and location criteria – generally towers more than 200 feet in height or located within certain distances of an airport – require notification to the Federal Aviation Administration and must be registered with the FCC prior to construction without regard to whether the Commission has eliminated the requirement for a construction permit. *See* 47 C.F.R. 17.4, 17.7.

D. The Development of the Nationwide Programmatic Agreement

In November 2001, representatives of the Commission, the ACHP, the National Conference of State Historic Preservation Officers, American Indian tribes, the communications industry (including petitioner CTIA), and historic preservation consultants, as part of a working group established by the ACHP in August 2000 on telecommunications matters, began drafting a proposed nationwide programmatic agreement intended to tailor the Section 106 review process in the communications context so as to improve compliance and streamline the review process for construction of towers and other Commission undertakings. At the same time, the parties intended to advance and preserve the goal of the NHPA to protect historic properties, including historic properties to which Indian tribes and Native Hawaiian organizations ("NHOs") attach religious and cultural signifi-

cance.[1] The need for such action arose from the explosive growth in the number of wireless telecommunications facilities in the 1990s. The Commission has noted that the number of wireless cell sites in the United States increased from a total of 913 in 1985 to 104,288 in 2000 and that this growth had imposed strains on all parties to the historic preservation review process and led to delays in deployment of new communications facilities. *Antenna Collocation*, 17 FCC Rcd at 511.

A draft Nationwide Programmatic Agreement ultimately was drafted by this group, and in June 2003, the FCC issued a notice of proposed rulemaking seeking public comment on the proposed agreement and on proposed changes to the FCC's rules that would implement the agreement. *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, 17 FCC Rcd 11664 (2003) (JA 204)("*NPRM*"). The proposed agreement provided detailed procedures governing the pre-construction obligations of applicants in connection with the section 106 review of proposed undertakings, including written notification to the appropriate local government, public participation requirements, consideration of public comments and making such comments available to the State Historic Preservation Office ("SHPO") prior to or contemporaneously with the SHPO's review of an applicant's submission. *See id.* at 11685-87 (JA 225-27).

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[1] In March 2001, the Commission, the ACHP and the Conference had entered into an agreement excluding from the Section 106 process most collocations of antennas on existing towers or other structures. *See Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, 16 FCC Rcd 5574 (WTB 2001), *reconsid. denied, Sprint PCS, LLC*, 20 FCC Rcd 2084 (WTB 2005); *see also Fact Sheet Regarding the March 16, 2001 Antenna Collocation Programmatic Agreement*, 17 FCC Rcd 508 (WTB 2002).

In addition, the proposed agreement set forth substantive standards applicants must apply in defining the area of potential effects, identifying historic properties within that area, evaluating the historic significance of identified properties, and assessing the effects of an undertaking on the historic properties identified. *NPRM,* 17 FCC Rcd at 11687-90 (JA 227-30). The proposed agreement further set forth procedures governing the submission of proposed findings by the applicant to the SHPO and the circumstances under which the FCC is to become involved in the consultation process. *Id.* at 11690-93 (JA 230-33).

II. FCC ADOPTION OF THE NATIONWIDE PROGRAMMATIC AGREEMENT

In the *Report and Order* before the Court in this case, the Commission adopted revisions to its rules to implement the *Nationwide Agreement*. *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, 20 FCC Rcd 1073 (2004)(*"R&O"*)(JA 43). With some revisions to the proposal originally set out in the *NPRM*, the Commission found that adoption of the revised agreement "will tailor the Section 106 review in the communications context in order to improve compliance and streamline the review process for construction of towers and other Commission undertakings, while at the same time advancing and preserving the goal of the NHPA to protect historic properties …." *Id.* at 1074 ¶1 (JA 44). In addition to other things, the agreement adopted categories of undertakings excluded from the Section 106 process because they were considered unlikely to have an impact on historic properties. *See R&O,* 20 FCC Rcd at 1147 (JA 124). The agreement also contained an illustrative list of activities and services covered by the agreement. *See id*. at 1176 (JA 153).

The Commission, in the *Report and Order*, resolved numerous issues relating to the implementation of the agreement. Relevant to the issues raised by petitioner CTIA here, the Commission declined to revisit its long-established interpretation of communications tower constructions as federal undertakings. The Commission explained that "an 'undertaking' under the NHPA means 'a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, *including … those requiring a Federal permit[,] license or approval*.'" *R&O*, 20 FCC Rcd at 1083 ¶25 (JA 53), *quoting* Section 106 of the NHPA. Section 319 of the Communications Act, 47 U.S.C. 319, "generally mandates preconstruction authorization from the Commission as a precondition to obtaining a license," and in those cases the applicability of Section 106 seemed clear.

As noted earlier, with respect to certain communications services, Section 319(d) of the Communications Act, 47 U.S.C. 319(d), requires or authorizes, depending on the type of service, elimination of preconstruction authorization as a condition for licensing based on the Commission's determination whether such authorizations are in the public interest.[2] In those common carrier services where the Commission has eliminated its prior

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[2] 47 U.S.C. 319(d) provides:

> A permit for construction shall not be required for Government stations, amateur stations, or mobile stations. A permit for construction shall not be required for public coast stations, privately owned fixed microwave stations, or stations licensed to common carriers, unless the Commission determines that the public interest, convenience, and necessity would be served by requiring such permits for any such stations. With respect to any broadcasting station, the Commission shall not have any authority to waive the requirement of a permit for construction, except that the Commission may by regulation determine that a permit shall not be required for minor changes in the facilities of authorized broadcast stations. With respect to

(footnote continued on following page)

requirement for preconstruction approval and applied "geographic area licensing," the Commission pointed out that "through its rules for environmental processing, [it had] expressly retained a limited approval authority for all tower construction to the extent necessary to ensure compliance with federal environmental statutes, including the NHPA." *R&O*, 20 FCC Rcd at 7083 ¶26 (JA 53).[3] Based on this express retention of these "limited approval requirements for facilities constructed in connection with geographic area licenses," the Commission concluded that it had "sufficient approval authority to trigger the requirements of section 106." *Id.*

In addition, the Commission noted that under the authority of 47 U.S.C. 303(q), it had adopted rules requiring that communications towers that meet certain height and location criteria be registered with the FCC prior to construction. *See* 47 C.F.R. 17.4, 17.7. "The pre-construction registration requirement, whereby any owner proposing to construct a new antenna structure must supply the Commission with the requisite FAA clearance, may be viewed as effectively constituting an approval process within the Commission's section 303(q) authority. As such, the Commission permissibly has viewed tower registration as a federal undertaking, in which 'imposition of environmental

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> any other station or class of stations, the Commission shall not waive the requirement for a construction permit unless the Commission determines that the public interest, convenience, and necessity would be served by such a waiver.

[3] The PCS and cellular wireless services that CTIA represents are commercial mobile radio services, which are treated as common carriage services under the Communications Act and the Commission's rules. *See* 47 U.S.C. 332(c)(1)(A); 47 C.F.R. 20.9(7), (11).

responsibilities on the structure owner is justified.'" *R&O*, 20 FCC Rcd at 1084 ¶27 (JA 54).

The *Report and Order* also addressed an issue raised by commenters concerning the definition of "historic properties." Some commenters had urged the Commission to limit the definition of historic properties to properties that are listed on the National Register of Historic Places or that formally have been determined eligible for such listing by the Keeper of the National Register pursuant to procedures established by the Secretary of the Interior, and exclude from that definition properties that are "potentially eligible" or that "may be eligible" but for which no formal eligibility determination has been made.[4] The NHPA defines "historic property" as "any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on the National Register …." 16 U.S.C. 470w(5). The ACHP's rules provide that the "term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria." 36 C.F.R. 800.16(l)(2).[5]

The Commission concluded that it should not alter the definition of historic property contained in the *Nationwide Agreement*, which was based on ACHP rules,

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[4] Criteria for evaluating the eligibility of historic properties for inclusion in the National Register and procedures for formal eligibility determinations as well as nomination for listing in the National Register are set out at 36 C.F.R. Parts 60 and 63.

[5] The Agreement defines historic property as: "Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or NHO that meet the National Register criteria." 20 FCC Rcd at 1146 (JA 123).

"defer[ring] to the Council's clearly stated interpretation of its own governing statute, which was recently upheld by the federal court reviewing amendments to the Council's rules." *R&O*, 20 FCC Rcd at 1117 ¶121 (JA 87), *citing National Mining Ass'n v. Slater*, 167 F.Supp.2d 265, 290-92 (D.D.C. 2001), *rev'd on other grounds*, 324 F.3d 752 (D.C.Cir. 2003). The Commission determined that "questions regarding the definition of historic properties are outside the scope of this proceeding and should be addressed, if at all, by the Council." *Id.*

However, the Commission found that "it is appropriate to narrow and define applicants' obligations with respect to the identification and evaluation of historic properties" under the *Nationwide Agreement*. *R&O*, 20 FCC Rcd at 1117 ¶121 (JA 87). Specifically, the Commission explained that the *Nationwide Agreement* "requires that, for most types of historic properties …, identification and evaluation efforts are limited to the applicant's review of five sets of records" and that with a few limited exceptions, applicants are not required to identify properties not contained in those records nor to evaluate the historic significance of such additional properties.[6] "[B]y limiting identification to available records of properties that have already been evaluated, we eliminate the need for the

[6] The five sets of records to which the Commission referred are listed in the *Nationwide Agreement*. *See* 20 FCC Rcd at 1156-57 (JA 133-34). The *Agreement* specifies that applicants "are required to review such records only to the extent they are available at the offices of the SHPO/THPO or can be found in publicly available sources identified by the SHPO/THPO. With respect to these properties, Applicants are not required to undertake a Field Survey or other measures other than reviewing these records in order to identify Historic Properties …." *Id.*

applicant to evaluate the historic significance of identified properties." *Id.* at 1118 ¶124 (JA 88).[7]

SUMMARY OF ARGUMENT

The FCC reasonably concluded that the regulatory scheme established by the Communications Act and the agency's regulations makes construction of radio communications towers necessary to provide FCC-licensed PCS and cellular radio services a federal undertaking for purposes of the National Historic Preservation Act. Thus such construction is subject to the Nationwide Programmatic Agreement adopted in the Report and Order on review.

It is well established that federal licensing of private activities such as tower construction makes those activities federal undertakings for purposes of the NHPA. CTIA contends that the NHPA only applies to activities that are funded by a federal agency, but acknowledges that this Court has directly rejected that argument in construing the NHPA. Numerous other courts have also held that federal licensing is sufficient to render an activity a federal undertaking for purposes of the NHPA.

The specific licensing scheme for cellular and PCS licenses that is at issue here makes tower construction associated with those licenses subject to the NHPA even though the Commission ordinarily does not specifically authorize construction of individual towers. The FCC has authority to license such stations pursuant to Section 301 of

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[7] Two commissioners, although generally supporting the Commission's goals in adopting the Nationwide Agreement, dissented in part from the agency's action insofar as it applies to construction of towers in situations where the agency licenses radio stations but does not issue permits for the construction of specific tower sites used by those stations. The two commissioners concluded that there was no "federal undertaking" within the meaning of NHPA in such circumstances. *See* JA 111, 114.

the Communications Act, and has authority to require permits for construction of facilities such as antenna towers for such stations pursuant to Section 319 of the Communications Act. The Commission has made a public interest determination pursuant to its authority under Section 319(d) to dispense with a requirement for permits for construction of wireless communications towers. However, the agency has by rule expressly limited that action by conditioning station licenses on an applicant's filing an environmental assessment with the Commission when tower construction may have a significant environmental effect, including an effect on historic properties. Significantly, the agency's rules specifically prohibit initiation of construction until it has ruled on the environmental assessment. This regulatory scheme makes tower constructions a "federal undertaking" subject to the NHPA, *i.e.*, "a project, activity, or program funded in whole or in part under the direct of indirect jurisdiction of a Federal agency, including … those requiring a Federal permit, license or approval …." 16 U.S.C. 470w(7).

The Commission's requirement that certain towers be registered with the agency pursuant to the authority of Section 303(q) of the Communications Act, dealing with hazards to air navigation, prior to these towers' construction bolsters the Commission's conclusion that tower construction is a federal undertaking for purposes of the NHPA.

CTIA's challenge to the Commission's decision to rely on the definition of "historic property" contained for many years in the regulations of the ACHP is barred by the doctrine of issue preclusion. In a direct challenge to a revision of the ACHP regulation in 2000, CTIA argued that "historic properties" were limited only to those properties on the National Register of Historic Places or formally determined to be eligible for such listing. The District Court rejected that argument and upheld the ACHP's regulation, which

defines "historic property" as any property listed on the National Register or eligible for listing, regardless whether a formal determination of eligibility has yet been made. CTIA's failure to appeal the District Court's adverse holding on that issue makes it binding with preclusive effects.

Even if CTIA is not barred from raising this claim now, it is incorrect. The statutory language on its face does not require any formal determination of eligibility before a property is subject to the NHPA's procedures. Neither the statutory context nor the legislative history of the relevant provi sions support the narrow interpretation advanced by CTIA. Moreover, contrary to CTIA's position, the longstanding judgment of the expert agency, the ACHP, is entitled to judi cial deference, and the FCC reasonably followed the ACHP's view of the scope of the statute. In addition, court decisions that have addressed the question have rejected the narrow construction of the statutory phrase "eligible for inclusion" that CTIA claims Congress intended.

Finally, the Commission adopted provisions in the Nationwide Agreement that largely make moot CTIA's complaint regarding the proper definition of eligible property, which has relevance insofar as a broader definition places a greater burden on applicants and licensees in identifying historic properties that their project or activity may affect. The Commission included terms in the Agreement that, in most cases, limits applicants' and licensees' responsibility to examining five specified lists of historic properties maintained by others. Under the agreement, applicants and licensees need not identify properties that are not listed in those records.

ARGUMENT

I. STANDARD OF REVIEW

The Administrative Procedure Act provides that a court may reverse the agency's determinations only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). That standard is highly deferential toward the agency; the Commission need only articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). The Court "presume[s] the validity of the Commission's action and will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

The agency's interpretation of its statute is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S 837, 842-843 (1984). Under *Chevron*, if "the intent of Congress is clear" from the language of the statute, "that is the end of the matter." *Id*., 467 U.S. at 842. But if the statutory language does not reveal the "unambiguously expressed intent of Congress" on the "precise question" at issue, the Court must accept the agency's interpretation as long as it is reasonable and "is not in conflict with the plain language of the statute." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

II. CONSTRUCTION OF AN ANTENNA TOWER FOR AN FCC LICENSED FACILITY IS AN "UNDERTAKING" SUBJECT TO THE REQUIREMENTS OF THE NHPA.

A. Federal Licensing Is Sufficient To Make A Project A Federal "Undertaking" Subject To NHPA.

Federal licensing constitutes an activity by a federal agency that makes some actions by private parties pursuant to those federal licenses, such as the construction of radio communications towers at issue in this case, subject to the requirements of the NHPA. Section 106 of the NHPA, 16 U.S.C. 470f, requires that any "independent agency having authority to license any undertaking shall, prior to the … issuance of any license … take into account the effect of the undertaking on any [historic property] that is included in or eligible for inclusion in the National Register." Section 301(5) of NHPA, 16 U.S.C. 470w(5), defines "undertaking" as

> a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including –
>
> (A) those carried out by or on behalf of the agency;
>
> (B) those carried out with Federal financial assistance;
>
> (C) those requiring a Federal permit, license, or approval; and
>
> (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

See also 36 C.F.R. 800.16(y)(ACHP rules defining "undertaking" using the terms of the statute).[8]

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[8] ACHP rules previously defined an undertaking as including "any project, activity or program … under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency." 36 C.F.R. 800.2(o) (1991). The Court quoted the ACHP definition with approval in *McMillan Park Comm. v. National Capital Planning Comm'n*, 968 F.2d 1283, 1285 (D.C.Cir. 1992). The NHPA originally defined "undertaking" simply as "any action as described in section 470f of this title," but Section 470f provided no explanation of the mean-

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Focusing on one element of this definition, CTIA contends that the NHPA applies only to an activity "'funded in whole or in part under the direct supervision of a Federal agency,'" which would exclude construction of communications towers by private parties such as CTIA's members. Br. at 9 n.4. However, CTIA recognizes, as it must, that this Court has directly rejected that argument. In *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 755 (D.C.Cir. 1995), the Court held that reading the NHPA definition of "undertaking" to exclude a federally licensed activity from the coverage of the statute (unless it is also federally funded) "would deprive the references to licensing in §106 [16 U.S.C. 470f] of any practical effect."

Other courts have similarly held that federal approval of private activities through licenses, permits or other forms of approval constitute undertakings within the meaning of the NHPA. For example, courts have held that Section 106 encompasses approvals such as those for mining activities,[9] railroad abandonments and exemptions,[10] changes in use of park land,[11] and authorizations for activities on or use of public lands under the

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ing of the term. Congress subsequently amended the NHPA to provide the current definition of "undertaking." *See* P.L. 102-575, 102d Cong., 2d Sess. (1992), 106 Stat. 4600, 4763-64. In determining whether the activity in *McMillan Park* constituted an "undertaking" for purposes of the NHPA, the Court "look[ed] to the Advisory Council's regulations implementing the NHPA, promulgated under authority granted by Congress, 16 U.S.C. § 470s," and held that the regulations "command substantial judicial deference." 968 F.2d at 1287-88.

[9] *National Indian Youth Council v. Andrus*, 501 F.Supp. 649 (D.N.M. 1980), *aff'd*, 664 F.2d 220 (10th Cir. 1981)

[10] *Berkshire Scenic Railway Museum v. ICC*, 52 F.3d 378 (1st Cir. 1995); *Friends of the Sierra R.R. v. ICC*, 881 F.2d 663 (9th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1990); *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479 (2d Cir. 1988).

[11] *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442 (D.C.Cir. 1994)

jurisdiction of the Forest Service or the Bureau of Land Management.[12] In addition, grants of various types of federal permits for private activities have been held to come within the meaning of federal undertakings covered by the NHPA.[13]

Even courts that have construed the scope of the NHPA narrowly have not gone so far as to suggest that federal licensing is inadequate to make an action a federal undertaking for purposes of NHPA unless federal funding is also involved. One court, for example, that believed Congress in the NHPA "intended to control direct federal spending" and licensing in its narrowest sense, had no difficulty concluding "that the [NHPA] clearly applies to licenses issued to TV stations by the FCC." *Weintraub v. Rural Elec. Admin.*, 457 Fed.Supp. 78, 92 (M.D. Pa. 1978).

CTIA's claim that the NHPA does not extend to the "[p]rivate activities of private actors, whatever their effect on historic properties" (Br. at 18), begs the question that is before the Court in this case – whether the federal government's authority over those activities through a statutory licensing process makes such private activities federal undertakings within the meaning of the NHPA. This and other courts have held that

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[12] *Apache Survival Comm'n v. United States*, 21 F.3d 895 (9th Cir. 1994)

[13] *See, e.g., Vieux Carre Property Owners v. Brown*, 875 F.2d 453, 464 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990)(Corps of Engineers permit for aquarium and park); *Abenake Nation v. Hughes*, 805 F.Supp. 234 (D.Vt. 1992), *aff'd*, 990 F.2d 729 (2nd Cir. 1993)(FERC license and Corps of Engineers permit for hydroelectric project); *Walsh v. United States Army Corps. of Engineers*, 757 F.Supp. 781 (W.D.Tx. 1990)(permit for construction of dam and reservoir); *Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425 (C.D.Cal. 1985)(permit related to construction of residential and commercial development); *Hough v. Marsh*, 557 F.Supp. 74 (D.Mass. 1982)(permit related to construction of residences); *National Trust for Historic Preservation v. United States Army Corps of Engineers*, 552 F.Supp. 784 (S.D. Ohio 1982)(permit for construction of barge facilities); *Citizens Comm. for Environmental Protection v. United States Coast Guard*, 456 F.Supp. 101 (D.N.J. 1978)(permit related to highway construction); *Wilson v. Block*, 708 F.2d 735 (D.C.Cir.), *cert. denied*, 464 U.S. 956 (1983)(permit for private development in government-owned ski area).

federal government approval through a licensing or other permitting process generally makes the authorized activity such an undertaking and therefore requires the agency to consider its effect on historic properties. As we discuss below, the particular licensing scheme established in the Communications Act and FCC rules for radio tower constructions is consistent with that general rule and constitutes a federal undertaking subject to the duties imposed by the NHPA.

B. The FCC Licensing Scheme For Cellular And PCS Services Is An "Undertaking" Within The Meaning Of The NHPA.

1. The Grant of Cellular And PCS Licenses Is Expressly Conditioned On Compliance With The FCC's Environmental Rules.

The core of CTIA's argument is that because the FCC does not in most instances require individual permits for the construction of wireless towers themselves and generally has little or no direct involvement in the actual location of the towers, construction of the towers cannot be considered federal undertakings subject to the NHPA.[14] According to CTIA, construction of towers to provide wireless communications services "is private conduct, not a federal undertaking." It is the "[p]rivate activities of private actors." Br. at 2,18. The Commission properly rejected that argument below, holding that

[14] Beyond its claim discussed above that the NHPA applies only to activities that are funded in whole or in part by the federal government (Br. at 9-10 n.4), CTIA argues that the applicability of the NHPA and the Agreement to only "two types of wireless communications services are at issue in this case: cellular services … and personal communications services." Br. at 4. It does not contend that any of the other FCC activities listed as covered by the Agreement (20 FCC Rcd at 1176-78 (JA 153-55)) have been improperly subjected to the requirements of the NHPA and the Agreement because they are not federal undertakings. Included among these are other wireless services that are licensed, in whole or in part, on a geographic area basis. *See, e.g*, 47 C.F.R. 27.11 (Wireless Communications Service); 47 C.F.R. 90.661, 90.681 (Specialized Mobile Radio Service).

the regulatory scheme provided it with "sufficient approval authority to trigger the requirements of Section 106." *R&O,* 20 FCC Rcd at 1083 ¶26 (JA 53).[15]

CTIA's desire to shift the focus of this case is understandable. However, the Agreement at issue here is not simply about the "private activities of private actors." It is about the activities of federal radio station licensees in relation to construction of facilities that are inextricably intertwined with, and essential to, the use of their federal radio station licenses that are mandated by 47 U.S.C. 301. Cellular and PCS radio stations at issue here cannot operate without antennas and towers to transmit their radio signals. The construction of these facilities is statutorily subject to the jurisdiction of the FCC, and the agency has by rule expressly conditioned such construction on compliance with, among other things, the relevant provisions of the National Historic Preservation Act. Contrary to CTIA's claim (Br. at 24), its members do receive "an 'actual license'" and "'explicit written permission'" that is conditioned by rule on compliance with the agency's environmental rules, which include historic preservation rules.

Section 319(a) of the Communications Act, 47 U.S.C. 319(a), prohibits the Commission from issuing a license for the operation of any radio station "unless a permit for its construction has been granted by the Commission." Section 319(d) of the Act, 47 U.S.C. 319(d), however, authorizes the Commission to dispense with preconstruction approval for facilities constructed in connection with various categories of licenses if it

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[15] We do not dispute that to the extent the Commission was construing the NHPA, its construction is not entitled to *Chevron* deference. *See* CTIA Br. at 20. However, the Commission's rejection of CTIA's arguments was primarily based on its construction of its Communications Act authority, and it is entitled to deference in construing that statute. *See, e.g., National Cable & Tel. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002)(applying *Chevron* analysis in reviewing FCC's construction of scope of its authority under Communications Act).

determines that the public interest would be served thereby. Specifically, Section 319(d) provides:

> A permit for construction shall not be required for Government stations, amateur stations, or mobile stations. A permit for construction shall not be required for public coast stations, privately owned microwave stations, or stations licensed to common carriers, unless the Commission determines that the public interest, convenience, and necessity would be served by requiring such permits for any such stations. With respect to any broadcasting station, the Commission shall not have any authority to waive the requirement of a permit for construction, except that the Commission may by regulation determine that a permit shall not be required for minor changes in the facilities of authorized broadcast stations. With respect to any other station or class of stations, the Commission shall not waive the requirement for a construction permit unless the Commission determines that the public interest, convenience, and necessity would be served by such a waiver.

With respect to the common carrier wireless services at issue here, the Commission generally has found that the public interest does not require a separate construction permit for each tower associated with the license it issues for a station's operation. The Commission found that dispensing with the requirement for a separate construction permit for each individual tower structure "would serve the public interest by, among other things, expediting the provision of communications service to the public." *R&O*, 20 FCC Rcd at 1083 ¶25 (JA 53).

These licenses that the agency issues cover operations in a specified geographic area. Licensees may construct tower and antenna facilities to provide service consistent with the provisions of their licenses and Commission rules without further authorization from the Commission. *See, e.g. Amendment of Part 22*, 7 FCC Rcd 2449, 2451 ¶¶ 14-15 (1992). However, as the Commission explained in the *Report & Order*, grant of these "geographic area" licenses has by rule been "conditioned on the applicant's compliance

with federal environmental statutes, including the NHPA." *R&O*, 20 FCC Rcd at 1083 ¶26 (JA 53). In 1990, the Commission amended its rules "to require that in situations where construction of a Commission-regulated radio communications facility is permitted without prior Commission authorization, the licensee or applicant must determine prior to construction whether the facility may have a significant environmental effect as defined in section 1.1307 of the rules …." *Amendment of Environmental Rules*, 5 FCC Rcd 2942 ¶1 (1990). Section 1.1307(a)(4) provides that actions that may have a significant environmental effect include "[f]acilities that may affect [historic properties] that are listed, or eligible for listing, in the National Register of Historic Places." 47 C.F.R. 1.1307(a)(4).[16] The Commission provided further in amending its rules in 1990 to address the issue of geographic licensing that "[i]f the proposed facility may have a significant effect on the environment, the applicant must file an Environmental Assessment and may not commence construction prior to Commission authorization." 5 FCC Rcd at 2942 ¶1 (emphasis added).

As a result of these determinations, the Commission adopted as part of its environmental rules a rule specifically addressing "facilities for which no preconstruction authorization is required." 47 C.F.R. 1.1312. That rule provides that for such facilities, the licensee or applicant must submit an environmental assessment as defined by 47 C.F.R. 1.1308 if it determines that "the proposed facility may have a significant environmental effect as defined in §1.1307." 47 C.F.R. 1.1312(a). That environmental assessment must be "ruled on by the Commission … prior to the initiation of construction of

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[16] *See also* 47 C.F.R. 1.929(a)(4)(classifying applications and amendments as "major" filings if for "a facility that would have a significant environmental effect ….")

the facility." 47 C.F.R. 1.1312(b). CTIA's contention that the "FCC imposes no licensing requirement pursuant to § 319(d)" (Br. at 21), thus, is incorrect. The condition requiring prior approval of the Commission for construction of a communications tower for wireless services that may have a significant environmental effect in connection with a geographic license is a "permit, license or approval" sufficient to make the construction a federal undertaking for purposes of the NHPA.

The Communications Act provides the FCC authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act …." 47 U.S.C. 303(r). An applicant takes its license subject to valid FCC rules in effect at the time the application is granted. *See FCC v. NCCB,* 555 F.2d 938, 955 (D.C.Cir. 1977), *rev'd in part on other grounds,* 436 U.S. 775 (1978); *P&R Temmer v. FCC,* 743 F.2d 918, 928 (D.C.Cir. 1984) ("FCC licensee takes its license subject to the conditions imposed on its use [which] may be contained in both the Commission's regulations and in the license.")

Nothing in Section 319(d) precludes the Commission, as part of its public interest determination to dispense with the formal requirement of a construction permit, from adopting rules that condition the grant of geographic licenses on compliance with requirements to submit an environmental assessment whenever a licensee proposes to construct a communications tower that may have a significant environmental effect, including an effect on historic properties. Indeed, "[a]dministrative agencies have been required to consider other federal policies not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulates operate in the public interest." *LaRose v. FCC,* 494 F.2d 1145, 1147 n.2 (D.C.Cir. 1974).

This is not equivalent, as CTIA contends (Br. at 23), to a "decision not to regulate." Quite the contrary. It is a decision to impose limited regulation as a condition on the grant of a geographic license. The Court's decision in *Sheridan Kalorama*, upon which CTIA relies (Br. at 24), involves an entirely different factual setting, and simply does not speak to the regulatory scheme of Section 319 and the Commission's rules regarding geographic licensing.

CTIA's argument (Br. at 30) that the agency's issuance of licenses under Section 301 of the Communications Act, 47 U.S.C. 301, is not a basis for imposing environmental, and historic preservation, conditions on licensees is without foundation.[17] Contrary to CTIA's claim that the "Commission itself determined that CMRS towers do not require Commission involvement" (Br. at 32), as we have noted above the regulatory scheme that the Commission has adopted specifically concluded that such involvement is required where such construction may have an environmental effect. Accordingly, the Commission has exercised its authority to condition grant of those licenses on compliance with its environmental regulations. The imposition of this condition makes the license an "ongoing federal undertaking for purposes of the NHPA" (Br. at 31) with respect to tower construction associated with the license.

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[17] CTIA's procedural claim (Br. at 30) that the Commission may not rely on its licensing authority under Section 301 before the Court because it did not do so in its order is equally baseless. The Commission's discussion of its adoption by rule of a condition on grant of geographic licenses requiring an environmental assessment for certain tower construction activity associated with those licenses plainly relied on the agency's Section 301 licensing authority, even if it did not expressly cite Section 301. *See, R&O,* 20 FCC Rcd at 1083-84 ¶¶25-28 (JA 53-54). *See, e.g., GTE Serv. Corp. v. FCC*, 205 F.3d 416, 422 (D.C.Cir. 2000) (court will uphold decision "'if the agency's path may reasonably be discerned.'").

This is not an "entirely circular" argument as CTIA contends. Br. at 25. In shifting to geographic licensing for cellular and PCS in 1992, the FCC necessarily made a public interest finding under Section 319(d) that the public interest favored geographic licensing and no exercise of FCC authority over tower siting in most cases. But, to the extent that a particular tower implicates environmental concerns under NHPA, NEPA and other statutes, the FCC struck a different public interest balance. In those circumstances, the FCC found that the Communications Act (*i.e.*, the public interest standard of Section 319(d)) required FCC control over tower siting prior to construction. Thus, contrary to CTIA's argument, the Commission is exercising its substantive Communications Act authority over tower siting in limited circumstances, relying on its public interest authority under Sections 301 and 319(d).

CTIA does not appear to dispute (putting aside the federal funding issue) that if the Commission had made a determination under Section 319(d) that maintaining a prior construction permit requirement for wireless tower construction was in the public interest, actions by the Commission on individual construction permit applications would constitute federal undertakings subject to NHPA. Even if CTIA disagrees with that proposition, the case law overwhelmingly supports the view that such federal licensing brings an activity within the meaning of a "federal undertaking." The FCC's decision that adopting a geographic licensing approach and dispensing with a requirement for construction permits is in the public interest only under certain conditions makes tower construction a federal undertaking within the meaning of the NHPA. The condition the Commission has imposed is that tower construction projects by licensees that receive geographic licenses must continue to comply with the agency's environmental rules. The

FCC continues to have "authority to license" (16 U.S.C. 470f) tower construction pursuant to Section 319(a) and (d), and its public interest determination to dispense with construction permits is conditioned on the licensee's compliance with its environmental rules. This continuing condition brings tower construction activities associated with FCC wireless radio licensees within NHPA's definition of "undertaking" as a "project … requiring a Federal permit, license, or approval …." 16 U.S.C. 470w(7).

In a situation involving a similar form of license, the Fifth Circuit held the NHPA's Section 106 process applicable. Under the Rivers and Harbors Act, 33 U.S.C. 403, the Corps of Engineers issues permits for construction within navigable waterways of the United States. The Corps' regulations provide for "individual" and "general" permits. The latter category includes "nationwide" permits, which provide that under certain conditions, "specified activities can take place without the need for an individual … permit." *See* 33 C.F.R. 325.5. The Fifth Circuit held in *Vieux Carre Property Owners v. Brown*, 875 F.2d 453, 465 (5th Cir. 1989), that a nationwide permit under Corps of Engineers rules constitutes a "license" triggering section 470f's historic impact review process unless the project at issue under the nationwide permit involves "truly inconsequential activities." *See also Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512-13 (10th Cir. 1985)(holding that "simply allowing a party to proceed under the nationwide permit is an action by the Corps triggering its obligation to consider environmental impacts" under the Clean Water Act).

2. The Requirement For Tower Registration

The Commission also found that the tower registration procedures it has adopted under the authority of 47 U.S.C. 303(q) constitute a federal undertaking, at least as to the

towers for which registration is required.[18] As the Commission explained, the registration procedure is a "means by which the Commission may assure, prior to construction, that towers do not pose a risk to air safety … [and] may be viewed as effectively constituting an approval process within the Commission's section 303(q) authority." *R&O*, 20 FCC Rcd at 1084 ¶27 (JA 54). The Commission concluded, when it adopted the current tower registration rules, that "registering a structure constitutes a 'federal action' or 'federal undertaking,' such that the imposition of environmental responsibilities on the structure owner is justified." *Streamlining the Commission's Antenna Structure Clearance Procedure*, 11 FCC Rcd 4272, 4289 ¶41 (1995).

The antenna registration rules are not "wholly ministerial," as CTIA claims. Br. at 27. The rules require the filing of a substantive application (FCC Form 854) that, if granted by the Commission, results in the issuance of an Antenna Structure Registration. *See* 47 C.F.R. 17.4. That the Commission has adopted procedures that ordinarily lead to prompt and efficient processing of these applications does not demonstrate that the Commission's action is non-discretionary and ministerial. The process requires an application that is acted on by the Commission, after prior FAA approval, and which is subject to objections that the Commission entertains.[19] *See, e.g., Friends of the Earth, Inc.*, 17 FCC

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[18] The applicable rule requires that "the owner of any proposed or existing antenna structure that requires notice of proposed construction to the Federal Aviation Administration must register the structure with the Commission." 47 C.F.R. 17.4. Notification to the FAA, with several limited exceptions, is required for any antenna structure greater than 200 feet above ground level or structures of varying heights within specified distances of airport runways. 47 C.F.R. 17.7. 17.14. Approximately 75,000 of the 500,000 antenna structures in the United States require notification to the FAA and registration with the FCC. *See* 11 FCC Rcd at 4275 ¶5.

[19] Where an antenna structure registration application is accompanied by an environmental assessment pursuant to 47 C.F.R. 1.1307, such applications are placed on public notice and the Commission does not act on such applications until there has been opportunity for public com-

(footnote continued on following page)

Rcd 201 (WTB 2002), *appl. for rev. denied*, 18 FCC Rcd 23622 (2003)(granting antenna registration application and dismissing petitions to deny); *State of Md. Dept. of Budget and Management*, 16 FCC Rcd 17130 (WTB 2001)(granting antenna registration application and denying petitions to deny antenna registration application). These are not the sorts of "nondiscretionary, ministerial agency actions" at issue in cases cited by CTIA. *See* Br. at 27. That the Commission retains this requirement for approval before towers that come within the registration requirement can be constructed brings those projects within the meaning of a "federal undertaking" pursuant to the NHPA as a project or activity "requiring a Federal permit, license or approval …" that is subject to the Section 106 process. 16 U.S.C. 470w(7)(C), 16 U.S.C. 470f.

III. THE NATIONWIDE AGREEMENT'S PROVISIONS GOVERNING A PROPERTY'S ELIGIBILITY FOR NHPA PROTECTION ARE REASONABLE.

A. CTIA Is Barred By The Doctrine Of Issue Preclusion From Relitigating This Question.

The doctrine of issue preclusion bars parties from relitigating issues of fact or law "'contested by the parties and submitted for judicial determination in [a] prior case,'" so long as the issue was actually and necessarily determined by a court of competent jurisdiction in that prior case and preclusion in the second case would not work a basic unfairness to the party bound by the first determination. *Government of Rwanda v. Johnson*, 409 F.3d 368, 374 (D.C.Cir. 2005), *quoting*, *Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C.Cir. 1992). Issue preclusion does not require mutuality of parties. *See Government of Rwanda*, 409 F.3d at 375.

(footnote continued from preceding page)

ment. *See* 47 C.F.R. 17.4(c); PUBLIC NOTICE, *Antenna Structure Service Information, Report No. CWS-05-65* (Aug. 26, 2005), 2005 WL 2055944.

As discussed below, CTIA contends that the Nationwide Agreement adopts an unlawfully broad definition of "historic property" as used in the ACHP rules. CTIA claims that the definition contained in the ACHP rule accepted by the Commission "impermissibly extends the scope of Section 106" to properties that "may be eligible" or that are "potentially eligible" for inclusion in the National Register. CTIA's contention is that only properties listed on the National Register or those formally determined to be eligible for such listing are subject to the Section 106 process. Br. at 33-34, 36.

That specific argument was raised by CTIA in challenging ACHP rules in 2001 and rejected by the District Court. *See National Mining Ass'n v. Slater*, 167 F.Supp. 265, 279, 290-92 (D.D.C. 2001), *rev'd on other grounds*, 324 F.3d 752 (D.C.Cir. 2003).[20] The court described the plaintiffs' argument there as that the ACHP rule "impermissibly extends the scope of the [NHPA] by extending section 106 to properties that are only potentially eligible for the National Register." *Id.* at 291. The court held that ACHP's position to the contrary – that the "eligible for inclusion" language applies more broadly to properties that meet the criteria for inclusion whether or not a formal determination of eligibility has been made – was a "permissible construction of the statute" that "furthers the express purposes of the" NHPA. *Id.* at 292. Accordingly, the court upheld the ACHP regulations "requiring an agency to identify properties that may be eligible for the National Register and to determine whether, in fact, those properties are eligible before proceeding with the section 106 process." *Id.*

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[20] It appears that the other plaintiff in that litigation, National Mining Association, actually raised the argument, but CTIA "incorporated all of NMA's arguments by reference." *National Mining*, 167 F.Supp. at 279 n. 14.

CTIA did not appeal the judgment of the District Court in *National Mining*.[21] Its failure to appeal makes the district court's judgment final on this issue, with preclusive effect as to CTIA. *See Qwest Corp. v. FCC*, 252 F.2d 462, 466 (D.C.Cir. 2001). CTIA acknowledges the *National Mining* decision, arguing that it is "not binding on this Court, and is in any event unpersuasive." Br. at 42 n.15. It is certainly true that *National Mining* is not binding on this Court, but it is binding on CTIA. If CTIA believed the district court's ruling unpersuasive, as it now claims, it had an opportunity to appeal that decision to this court. Its failure to do so precludes it from relitigating the issue in this case.

B. The Provisions of the Agreement Regarding Identification Of Historic Properties Are Reasonable.

Even if not barred by the doctrine of issue preclusion, CTIA's argument is incorrect. The draft Nationwide Agreement set out in the *NPRM* defined "historic properties," which applicants are required to identify and evaluate, as any "prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register …." *NPRM*, 18 FCC Rcd at 11676 (JA 216). This definition conforms to the definition contained in the NHPA and regulations of the ACHP. *See* 16 U.S.C. 470w(5); 36 C.F.R. 800.16(l). Some commenters argued that this definition was "unworkably burdensome because too many properties are 'eligible' and there is no ready way to identify these properties." They contended that the definition of "historic property" should be limited to properties that either have been listed on the National

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[21] The other plaintiff successfully appealed the district court's judgment. *See National Mining Ass'n v. Fowler*, 324 F.3d 752 (D.C.Cir 2003). However, the only substantive issue raised on appeal, and the only issue on which the Court ruled, involved whether Section 106 of the NHPA applies to State or local regulation administered pursuant to a delegation or approval by a federal agency. *Id.* at 758-60.

Register or have been formally determined by the Keeper of the National Register to be eligible for listing. *R&O*, 20 FCC Rcd at 1116 ¶119 (JA 86). The Commission responded to the comments by narrowing applicants' obligations with respect to the identification and evaluation of historic properties, although it declined to modify the Agreement's definition of the term "historic properties." *See id*. at 1117-20 ¶¶121-127 (JA 87-90).

In its brief, CTIA reiterates the claim that the NHPA, if it is applicable at all, requires the identification and evaluation of only those historic properties that are listed on the National Register or that have been formally determined pursuant to regulations issued by the Secretary of the Interior to be eligible to be listed. The Commission may not, according to CTIA's interpretation of the NHPA, require applicants to evaluate the effect of their activities on historic properties that are eligible for inclusion on the National Register – that is, that satisfy the eligibility criteria established by the Secretary of the Interior – but for which no prior formal determination of eligibility has been made. *See* Br. at 33-42.

The language of the NHPA on its face does not require any formal determination of eligibility. A "historic property" is defined as one that is "included in, or eligible for inclusion on the National Register." 16 U.S.C. 470w(5). The statute repeats this definition with respect to the Section 106 process, specifying that federal agencies must take into account the effect of their undertakings on properties "included in or eligible for inclusion in the National Register." 16 U.S.C. 470f. The natural meaning of this language is that the term "historic properties" encompasses properties that both have been placed on the National Register pursuant to regulations established by the Secretary of the

Interior or properties that meet the criteria established by regulation for inclusion on the register. *See generally* 36 C.F.R. Parts 60 and 63.

CTIA, however, claims that the statutory language refers instead to two categories of properties for which formal determinations have been made: (1) those listed on the National Register, and (2) those for which the Keeper of the National Register has made a "determination of eligibility," pursuant to Department of the Interior regulations governing decisions that a property "meets the National Register criteria for evaluation although the property is not formally listed in the National Register." 36 C.F.R. 60.3(c).

CTIA's construction of the statute is an approach that Congress might have adopted, but it did not do so. The statutory language refers to properties "eligible for inclusion," not properties that have been determined eligible for inclusion. CTIA's claim that the statute's reference to two categories of historic properties – those "included in" and those "eligible for inclusion in" the National Register – "corresponds to the two lists maintained by the Keeper and published in the Federal Register" (Br. at 34) is pure speculation. The statutory language does not say that, and neither the statute's structure nor its legislative history calls for construing the statutory language to mean something other than what it says.

That Congress has used varying terms to define or refer to historic properties in different provisions of the NHPA and other statutes is, at most, ambiguous and can be read to undermine CTIA's position. For example, in a provision relating to agencies' responsibilities for properties under their ownership or control, the statute refers to properties "as are listed in *or may be eligible* for the National Register." 16 U.S.C. 470h-2(a)(2)(B)(emphasis added). While this language is arguably broader than the term "eli-

gible for inclusion," it cannot support the weight CTIA places on it (Br. at 36) to demonstrate that "eligible for inclusion" applies only to properties formally determined eligible by the Keeper of the National Register. The same can be said for other provisions cited by CTIA. *See* Br. at 36-38.

Congress has used the term "determined eligible for inclusion in the National Register" in other statutory provisions, which suggests, contrary to CTIA's position, that its failure to use that term in the provisions relevant here meant that it intended a broader meaning when it omitted the term "determined." For example, in legislation addressing the title of states in abandoned shipwrecks, Congress stated: "The United States asserts title to any abandoned shipwreck that is … on submerged lands of a State and is included in or determined eligible for inclusion in the National Register." P.L. 100-298, 100th Cong., 2d Sess. (1988), *codified at* 43 U.S.C. 2105(a)(3) (emphasis added). *See also* 16 U.S.C. 469l-1(b)(2)(directing Secretary of Interior to establish program to be known as National Underground Railroad Network to Freedom, one element of which is to include "properties pertaining to the Underground Railroad that … are included on, or determined by the Secretary to be eligible for inclusion on, the National Register of Historic Places). That Congress chose not to employ the term "determined" or "determined by the Secretary to be" in the NHPA supports the broader meaning of the term "eligible for inclusion" that is contained in the Nationwide Agreement.

CTIA cites one sentence in a 1975 Senate report accompanying legislation that added the "eligible for inclusion" language to the NHPA in which the committee cited ACHP testimony describing the language as relating to "procedures for requiring agency comments on properties *determined eligible* for inclusion in the National Register …."

Br. at 38, *quoting* S.Rep. No. 94-367, 94th Cong., 2nd Sess. 13 (1975)(emphasis added by CTIA). It is far from clear that this very brief discussion refers to anything other than federal agencies' responsibilities under Section 106 to allow the ACHP an opportunity to comment when an undertaking will have an effect on a historic property that the particular agency itself has determined is eligible for listing on the National Register. This is particularly true, in light of language not cited by CTIA that is contained in an ACHP report to the committee, in which the ACHP states: "Since 1966, the National Environmental Policy Act of 1969 and Executive Order 11593 of 1971 have expanded the Council's review responsibilities, conducted pursuant to the Council's procedures (36 C.F.R. 800), to include properties that are eligible for inclusion in the National Register. Recognition of these existing responsibilities, by amendment of Section 106 to include 'properties eligible for inclusion in the National Register,' would clarify and support the Council's present project review activities." *Id.* at 33 (emphasis added).

Adding weight to the conclusion that Congress did not intend to restrict the definition of historic properties under Section 106 to those formally determined to be eligible for inclusion on the National Register, ACHP regulations reject CTIA's statutory interpretation. ACHP rules expressly provide that the "term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria." 36 C.F.R. 800.16(l)(2). The Court has held that ACHP regulations implementing the NHPA, which are "promulgated under authority granted by Congress, 16 U.S.C. 470f, … command substantial judicial deference" in construing the terms of the NHPA. *McMillan Park Comm. v. National Capital Planning Comm'n*, 968

F.2d 1283, 1287-88 (D.C.Cir. 1992); *see also Sheridan Kalorama*, 49 F.3d at 755. In these circumstances, the FCC can hardly be faulted for following the interpretation of ACHP, the agency authorized by Congress to issue regulations implementing the NHPA.

CTIA claims that NHPA's rule is entitled to no deference in construing the statute because the Secretary of the Interior has responsibility for administering other sections of the statute that also contain the term "eligible for inclusion in the National Register" and that deference is inappropriate in such circumstances. Br. at 39-42. However, the same could be said for construction of the term "undertaking," and the Court in *McMillan Park* extended substantial deference to the ACHP's regulations implementing the NHPA in construing that term. *See* 968 F.2d at 1287-88.

Moreover, the district court in *National Mining Ass'n* accorded the ACHP's regulation deference on the precise question of the proper construction of the term "eligible for inclusion in the National Register." *See* 167 F.Supp.2d at 292, *rev'd on other grounds*, 324 F.3d 752. Deference aside, the longstanding judgment of an expert agency such as the ACHP, which was involved in drafting the statutory language in dispute,[22] whose judgment "furthers the express purposes of the Act" (*id.*) and does not conflict with any other administrative construction of the relevant statutory term, should have significant persuasive force as compared to the self-interested arguments advanced by a private party such as CTIA. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

Finally, court decisions that have addressed this question, with one exception, have rejected the narrow construction of the statutory phrase "eligible for inclusion" that

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[22] *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982).

CTIA claims Congress intended. In *National Mining Association*, the Court rejected essentially the same argument, holding that the NHPA is "ambiguous" with respect to this question and that the ACHP's rules are based on "a permissible construction of the statute" that "furthers the express purposes of the Act and is therefore neither arbitrary or capricious." 167 F.Supp.2d at 292, *rev'd on other grounds*, 324 F.3d 752.

The Fifth Circuit reached a similar conclusion in *Boyd v. Roland*, 789 F.2d 347, 349 (5th Cir. 1986), holding that "[a] plain reading of section 106 … persuades us that property qualifies as eligible property on the basis of literal eligibility under the National Register criteria. Consequently, we conclude that eligible property is not restricted to property that has been officially *determined* eligible for inclusion in the National Register." *See also Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425, 1437 (D.C.Cal. 1985)("What is an eligible property for purposes of NHPA turns upon the inherent historical and cultural significance of the property and not opinion of its worth by the Secretary of Interior. Under NHPA, properties that are part of the rich heritage of our nation are afforded the same guarantees of protection afforded properties already determined eligible."); *Hough v. Marsh*, 557 F.Supp. 74, 88 (D.Mass. 1982)(rejecting argument that the Section 106 process applied only to properties which had been officially determined eligible for listing, holding that "the absence of any official determination of eligibility here did not render the statute inapplicable.")

CTIA seeks to avoid these holdings by arguing that they did not "substantively analyze either the appropriateness of deference to the ACHP or the structure of the NHPA and its legislative history." Br. at 39 n.13. Rather, it relies on *Birmingham Realty Co. v. GSA*, 497 F.Supp. 1377 (N.D.Ala. 1980), apparently finding persuasive that court's

observation that "if 'eligible' were read to mean 'potentially eligible' rather than 'determined eligible,' then the scope of Section 106 would extend to 'every building over fifty years old in this country,' a result Congress could not have intended. 497 F.Supp. at 1388 & n.22." Br. at 39 n.13. Whatever else may be said of the meaning of the statutory term "eligible for inclusion," this exaggerated claim for imposing the narrowest possible construction on the term is baseless.

First, Section 106 obviously does not extend to every old building in the country. The NHPA generally limits its scope to properties that are "significant in American history, architecture, engineering, and culture," and requires the Secretary of the Interior to "establish or revise criteria for properties to be included on the National Register …." 16 U.S.C. 470a(a)(1)(A), (a)(2). The Secretary has established such criteria, and CTIA offers no reason to suggest that agencies are incapable of applying those criteria to determine whether properties that may be affected by their undertakings are protected by the Section 106 process. Indeed, the applicable regulations describe agencies' roles in eligibility determinations. *See* 36 C.F.R. Part 63.

Second, *Birmingham Realty's* approach ignores that the Section 106 process requires identification and evaluation of historic properties only within the "area of potential effects," or APE, which is the area "within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist." 36 C.F.R. 800.4(a), 800.16(d). Thus, however many properties in the entire country may be "potentially eligible" for inclusion in the National Register, with respect to any particular undertaking, only a relatively small number would be directly or indirectly affected. In the case of the Agreement here, for example, the area of potential

effects for radio communications towers ordinarily is limited to ½ - 1½ miles from the proposed tower depending on its height. *See R&O*, 20 FCC Rcd at 1155-56 (JA 132-33).

Finally, there is no reason to believe, as the *Birmingham Realty* court apparently believed, that Congress intended the NHPA to have the sort of narrow scope that CTIA urges. Congress' findings that underlay adoption of the NHPA reflect a broad concern that "preservation of this irreplaceable heritage [of historic properties] is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans …." 16 U.S.C. 470(b)(4). As the court observed in *National Mining Ass'n*, "the fact that a property has never been considered by the Keeper neither diminishes its importance nor signifies that it lacks the characteristics that would qualify for the National Register." 167 F.Supp.2d at 292, *rev'd on other grounds*, 324 F.3d 752.

CTIA's assertion that the FCC misconstrued its authority in deferring to the ACHP's rule construing the "eligible for inclusion" language of the NHPA is irrelevant. Br. at 39-40. CTIA asserts that the Commission had authority in entering into the Agreement to modify any aspects of the ACHP regulations. While the Commission chose not to modify the definition of "historic property," it directly addressed the complaints of commenters regarding the requirement to identify and evaluate all historic properties and not just those that had been formally determined eligible for inclusion on the National Register and adopted procedures that significantly mitigated those concerns. Specifically, the Commission modified the draft Nationwide Agreement to require that in most cases applicants are required only to review five sets of records maintained by the relevant SHPO/THPO that list properties as to which eligibility determinations have been made.

An applicant need not identify properties that are not listed in those records "nor need it evaluate the historic significance of such properties. Moreover, by limiting identification to available records of properties that have already been evaluated, we eliminate the need for the applicant to evaluate the historic significance of identified properties." *R&O*, 20 FCC Rcd at 1118 ¶124 (JA 88).[23]

[23] The five sets of records list: (1) properties on the National Register; (2) properties determined by the Keeper as eligible for the National Register; (3) properties that the SHPO/THPO is in the process of nominating for the National Register; (4) properties that the SHPO/THPO and another federal agency have determined to be eligible for listing on the National Register; (5) properties that the SHPO/THPO has evaluated and determined to be eligible for the National Register. *See* Agreement §VI.D.1.a. (JA 133-34).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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September 7, 2005

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CTIA – THE WIRELESS ASSOCIATION, PETITIONER	)	
v.	)	**No. 05-1008**
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA RESPONDENTS	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and D.C. Cir. Rule 32(a)(2), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains **12,349** words as measured by the word count function of Microsoft Word 2002.

C. Grey Pash, Jr.

September 7, 2005

STATUTORY APPENDIX

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16 U.S.C. § 470 - Short title; Congressional finding and declaration of policy

(a) This subchapter may be cited as the "National Historic Preservation Act".

(b) The Congress finds and declares that--

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;
(2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
(3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;
(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;
(5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;
(6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and
(7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

16 U.S.C. § 470a(a) - Historic preservation program

(a) National Register of Historic Places; designation of properties as historic landmarks; properties deemed included; criteria; nomination of properties by States, local governments or individuals; regulations; review of threats to properties

(1)(A) The Secretary of the Interior is authorized to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture. Notwithstanding section 1125(c) of Title 15, buildings and structures on or eligible for inclusion on the National Register of Historic Places (either individually or as part of a historic district), or designated as an individual landmark or as a contributing building in a historic district by a unit of State or local government, may retain the name historically associated with the building or structure.

(B) Properties meeting the criteria for National Historic Landmarks established pursuant to paragraph (2) shall be designated as "National Historic Landmarks" and included on the National Register, subject to the requirements of paragraph (6). All historic properties included on the National Register on December 12, 1980, shall be deemed to be included on the National Register as of their initial listing for purposes of this subchapter. All historic properties listed in the Federal Register of February 6, 1979, as "National Historic Landmarks" or thereafter prior to the effective date of this Act are declared by Congress to be National Historic Landmarks of national historic significance as of their initial listing as such in the Federal Register for purposes of this subchapter and sections 461 to 467 of this title; except that in cases of National Historic Landmark districts for which no boundaries have been established, boundaries must first be published in the Federal Register.

(2) The Secretary in consultation with national historical and archaeological associations, shall establish or revise criteria for properties to be included on the National Register and criteria for National Historic Landmarks, and shall also promulgate or revise regulations as may be necessary for--
(A) nominating properties for inclusion in, and removal from, the National Register and the recommendation of properties by certified local governments;
(B) designating properties as National Historic Landmarks and removing such designation;
(C) considering appeals from such recommendations, nominations, removals, and designations (or any failure or refusal by a nominating authority to nominate or designate);
(D) nominating historic properties for inclusion in the World Heritage List in accordance with the terms of the Convention concerning the Protection of the World Cultural and Natural Heritage;
(E) making determinations of eligibility of properties for inclusion on the National Register; and
(F) notifying the owner of a property, any appropriate local governments, and the general public, when the property is being considered for inclusion on the National Register, for designation as a National Historic Landmark or for nomination to the World Heritage List.

(3) Subject to the requirements of paragraph (6), any State which is carrying out a program approved under subsection (b) of this section, shall nominate to the Secretary properties which meet the criteria promulgated under subsection (a) of this section for inclusion on the National Register. Subject to paragraph (6), any property nominated under this paragraph or under section 470h-2(a) (2) of this title shall be included on the National Register on the date forty-five days after receipt by the Secretary of the nomination and the necessary documentation, unless the Secretary disapproves such nomination within such forty-five day period or unless an appeal is filed under paragraph (5).

(4) Subject to the requirements of paragraph (6) the Secretary may accept a nomination directly from any person or local government for inclusion of a property on the National Register only if such property is located in a State where there is no program approved under subsection (b) of this section. The Secretary may include on the National Register any property for which such a nomination is made if he determines that such property is eligible in accordance with the regulations promulgated under paragraph (2). Such determination shall be made within ninety days from the date of the nomination unless the nomination is appealed under paragraph (5).

(5) Any person or local government may appeal to the Secretary a nomination of any historic property for inclusion on the National Register and may appeal to the Secretary the failure or refusal of a nominating authority to nominate a property in accordance with this subsection.

(6) The Secretary shall promulgate regulations requiring that before any property or district may be included on the National Register or designated as a National Historic Landmark, the owner or owners of such property, or a majority of the owners of the properties within the district in the case of an historic district, shall be given the opportunity (including a reasonable period of time) to concur in, or object to, the nomination of the property or district for such inclusion or designation. If the owner or owners of any privately owned property, or a majority of the owners of such properties within the district in the case of an historic district, object to such inclusion or designation, such property shall not be included on the National Register or designated as a National Historic Landmark until such objection is withdrawn. The Secretary shall review the nomination of the property or district where any such objection has been made and shall determine whether or not the property or district is eligible for such inclusion or designation, and if the Secretary determines that such property or district is eligible for such inclusion or designation, he shall inform the Advisory Council on Historic Preservation, the appropriate State Historic Preservation Officer, the appropriate chief elected local official and the owner or owners of such property, of his determination. The regulations under this paragraph shall include provisions to carry out the purposes of this paragraph in the case of multiple ownership of a single property.

(7) The Secretary shall promulgate, or revise, regulations--
(A) ensuring that significant prehistoric and historic artifacts, and associated records, subject to section 470h-2 of this title, the Act of June 27, 1960 (16 U.S.C. 469c [16 U.S.C.A. § 469 et seq.]), and the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa and following [16 U.S.C.A. § 470aa et seq.]) are deposited in an institution with adequate long-term curatorial capabilities;
(B) establishing a uniform process and standards for documenting historic properties by public agencies and private parties for purposes of incorporation into, or complementing, the national historical architectural and engineering records within the Library of Congress; and
(C) certifying local governments, in accordance with subsection (c) (1) of this section and for the allocation of funds pursuant to section 470c(c) of this title.

(8) The Secretary shall, at least once every 4 years, in consultation with the Council and with State Historic Preservation Officers, review significant threats to properties included in, or eligible for inclusion on, the National Register, in order to--
(A) determine the kinds of properties that may be threatened;
(B) ascertain the causes of the threats; and
(C) develop and submit to the President and Congress recommendations for appropriate action.

16 U.S.C. § 470f - Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470h-2 - Historic properties owned or controlled by Federal agencies

(a) Responsibilities of Federal agencies; program for identification, evaluation, nomination, and protection

(1) The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency. Prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency, in accordance with Executive Order No. 13006, issued May 21, 1996 (61 Fed. Reg. 26071). Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 470a(g) of this title, any preservation, as may be necessary to carry out this section.

(2) Each Federal agency shall establish (unless exempted pursuant to section 470v of this title), in consultation with the Secretary, a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties. Such program shall ensure--
(A) that historic properties under the jurisdiction or control of the agency, are identified, evaluated, and nominated to the National Register;
(B) that such properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 470f of this title and gives special consideration to the preservation of such values in the case of properties designated as having National significance;
(C) that the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning;
(D) that the agency's preservation-related activities are carried out in consultation with other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations carrying out historic preservation planning activities, and with the private sector; and
(E) that the agency's procedures for compliance with section 470f of this title--
(i) are consistent with regulations issued by the Council pursuant to section 470s of this title;

(ii) provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with State Historic Preservation Officers, local governments, Indian tribes, Native Hawaiian organizations, and the interested public, as appropriate, regarding the means by which adverse effects on such properties will be considered; and
(iii) provide for the disposition of Native American cultural items from Federal or tribal land in a manner consistent with section 3002(c) of Title 25.

(b) Records on historic properties to be altered or demolished; deposit in Library of Congress or other appropriate agency

Each Federal agency shall initiate measures to assure that where, as a result of Federal action or assistance carried out by such agency, an historic property is to be substantially altered or demolished, timely steps are taken to make or have made appropriate records, and that such records then be deposited, in accordance with section 470a(a) of this title, in the Library of Congress or with such other appropriate agency as may be designated by the Secretary, for future use and reference.

(c) Agency Preservation Officer; responsibilities; qualifications

The head of each Federal agency shall, unless exempted under section 470v of this title, designate a qualified official to be known as the agency's "preservation officer" who shall be responsible for coordinating that agency's activities under this subchapter. Each Preservation Officer may, in order to be considered qualified, satisfactorily complete an appropriate training program established by the Secretary under section 470a(h) of this title.

(d) Agency programs and projects

Consistent with the agency's missions and mandates, all Federal agencies shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this subchapter and, give consideration to programs and projects which will further the purposes of this subchapter.

(e) Review of plans of transferees of surplus federally owned historic properties

The Secretary shall review and approve the plans of transferees of surplus federally owned historic properties not later than ninety days after his receipt of such plans to ensure that the prehistorical, historical, architectural, or culturally significant values will be preserved or enhanced.

(f) Planning and actions to minimize harm to National Historic Landmarks

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable

opportunity to comment on the undertaking.

(g) Costs of preservation as eligible project costs

Each Federal agency may include the costs of preservation activities of such agency under this subchapter as eligible project costs in all undertakings of such agency or assisted by such agency. The eligible project costs may also include amounts paid by a Federal agency to any State to be used in carrying out such preservation responsibilities of the Federal agency under this subchapter, and reasonable costs may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit.

(h) Annual preservation awards program

The Secretary shall establish an annual preservation awards program under which he may make monetary awards in amounts of not to exceed $1,000 and provide citations for special achievement to officers and employees of Federal, State, and certified local governments in recognition of their outstanding contributions to the preservation of historic resources. Such program may include the issuance of annual awards by the President of the United States to any citizen of the United States recommended for such award by the Secretary.

(i) Environmental impact statement

Nothing in this subchapter shall be construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required under the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.], and nothing in this subchapter shall be construed to provide any exemption from any requirement respecting the preparation of such a statement under such Act.

(j) Waiver of provisions in event of natural disaster or imminent threat to national security

The Secretary shall promulgate regulations under which the requirements of this section may be waived in whole or in part in the event of a major natural disaster or an imminent threat to the national security.

(k) Assistance for adversely affected historic property

Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 470f of this title, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.

(l) Documentation of decisions respecting undertakings

With respect to any undertaking subject to section 470f of this title which adversely affects any

property included in or eligible for inclusion in the National Register, and for which a Federal agency has not entered into an agreement pursuant to regulations issued by the Council, the head of such agency shall document any decision made pursuant to section 470f of this title. The head of such agency may not delegate his or her responsibilities pursuant to such section. Where a section 470f of this title memorandum of agreement has been executed with respect to an undertaking, such memorandum shall govern the undertaking and all of its parts.

16 U.S.C. § 470i - Advisory Council on Historic Preservation

(a) Establishment; membership; Chairman

There is established as an independent agency of the United States Government an Advisory Council on Historic Preservation which shall be composed of the following members:
(1) a Chairman appointed by the President selected from the general public;
(2) the Secretary of the Interior;
(3) the Architect of the Capitol;
(4) the Secretary of Agriculture and the heads of four other agencies of the United States (other than the Department of the Interior) the activities of which affect historic preservation, designated by the President;
(5) one Governor appointed by the President;
(6) one mayor appointed by the President;
(7) the President of the National Conference of State Historic Preservation Officers;
(8) the Chairman of the National Trust for Historic Preservation;
(9) four experts in the field of historic preservation appointed by the President from the disciplines of architecture, history, archeology, and other appropriate disciplines;
(10) three at-large members from the general public, appointed by the President; and
(11) one member of an Indian tribe or Native Hawaiian organization who represents the interests of the tribe or organization of which he or she is a member, appointed by the President.

(b) Designation of substitutes

Each member of the Council specified in paragraphs (2) through (8) other than (5) and (6) of subsection (a) of this section may designate another officer of his department, agency, or organization to serve on the Council in his stead, except that, in the case of paragraphs (2) and (4), no such officer other than an Assistant Secretary or an officer having major department-wide or agency-wide responsibilities may be so designated.

(c) Term of office

Each member of the Council appointed under paragraph (1), and under paragraphs (9) through (11) of subsection (a) of this section shall serve for a term of four years from the expiration of his predecessor's term; except that the members first appointed under that paragraph shall serve for terms of one to four years, as designated by the President at the time of appointment, in such manner as to insure that the terms of not more than two of them will expire in any one year. The members appointed under paragraphs (5) and (6) shall serve for the term of their elected office

but not in excess of four years. An appointed member may not serve more than two terms. An appointed member whose term has expired shall serve until that member's successor has been appointed.

(d) Vacancies; term of office of members already appointed

A vacancy in the Council shall not affect its powers, but shall be filled, not later than sixty days after such vacancy commences, in the same manner as the original appointment (and for the balance of any unexpired terms). The members of the Advisory Council on Historic Preservation appointed by the President under this subchapter as in effect on the day before December 12, 1980, shall remain in office until all members of the Council, as specified in this section, have been appointed. The members first appointed under this section shall be appointed not later than one hundred and eighty days after December 12, 1980.

(e) Designation of Vice Chairman

The President shall designate a Vice Chairman, from the members appointed under paragraph (5), (6), (9), or (10). The Vice Chairman may act in place of the Chairman during the absence or disability of the Chairman or when the office is vacant.

(f) Quorum

Nine members of the Council shall constitute a quorum.

16 U.S.C. § 470w - Definitions

As used in this subchapter, the term—

(1) "Agency" means agency as such term is defined in section 551 of Title 5.
(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and, upon termination of the Trusteeship Agreement for the Trust Territory of the Pacific Islands, the Republic of Palau.
(3) "Local government" means a city, county, parish, township, municipality, or borough, or any other general purpose political subdivision of any State.
(4) "Indian tribe" or "tribe" means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in section 1602 of Title 43, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
(5) "Historic property" or "historic resource" means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource.
(6) "National Register" or "Register" means the National Register of Historic Places established under section 470a of this title.

(7) "Undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including--
(A) those carried out by or on behalf of the agency;
(B) those carried out with Federal financial assistance;
(C) those requiring a Federal permit license, or approval; and
(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.
(8) "Preservation" or "historic preservation" includes identification, evaluation, recordation, documentation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance, research, interpretation, conservation, and education and training regarding the foregoing activities, or any combination of the foregoing activities.
(9) "Cultural park" means a definable area which is distinguished by historic resources and land related to such resources and which constitutes an interpretive, educational, and recreational resource for the public at large.
(10) "Historic conservation district" means an area which contains (A) historic properties, (B) buildings having similar or related architectural characteristics, (C) cultural cohesiveness, or (D) any combination of the foregoing.
(11) "Secretary" means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.
(12) 'State historic preservation review board" means a board, council, commission, or other similar collegial body established as provided in section 470a(b)(1)(B) of this title--
(A) the members of which are appointed by the State Historic Preservation Officer (unless otherwise provided for by State law),
(B) a majority of the members of which are professionals qualified in the following and related disciplines: history, prehistoric and historic archaeology, architectural history, architecture, folklore, cultural anthropology, curation, conservation, and landscape architecture, and
(C) which has the authority to--
(i) review National Register nominations and appeals from nominations;
(ii) review appropriate documentation submitted in conjunction with the Historic Preservation Fund;
(iii) provide general advice and guidance to the State Historic Preservation Officer; and
(iv) perform such other duties as may be appropriate.
(13) "Historic preservation review commission" means a board, council, commission, or other similar collegial body which is established by State or local legislation as provided in section 470a(c)(1)(B) of this title, and the members of which are appointed, unless otherwise provided by State or local legislation, by the chief elected official of the jurisdiction concerned from among--
(A) professionals in the disciplines of architecture, history, architectural history, planning, prehistoric and historic archaeology, folklore, cultural anthropology, curation, conservation, and landscape architecture, or related disciplines, to the extent such professionals are available in the community concerned, and
(B) such other persons as have demonstrated special interest, experience, or knowledge in history, architecture, or related disciplines and as will provide for an adequate and qualified commission.
(14) "Tribal lands" means--
(A) all lands within the exterior boundaries of any Indian reservation; and
(B) all dependent Indian communities.

(15) "Certified local government" means a local government whose local historic preservation program has been certified pursuant to section 470a(c) of this title.
(16) "Council" means the Advisory Council on Historic Preservation established by section 470i of this title.
(17) "Native Hawaiian" means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.
(18) "Native Hawaiian organization" means any organization which--
(A) serves and represents the interests of Native Hawaiians;
(B) has as a primary and stated purpose the provision of services to Native Hawaiians; and
(C) has demonstrated expertise in aspects of historic preservation that are culturally significant to Native Hawaiians. The term includes, but is not limited to, the Office of Hawaiian Affairs of the State of Hawaii and Hui Malama I Na Kupuna O Hawai'i Nei, an organization incorporated under the laws of the State of Hawaii.

47 U.S.C. § 151 - Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 157 - New technologies and services

(a) It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

(b) The Commission shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed. If the Commission initiates its own proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated.

47 U.S.C. § 301 - License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 303 - Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--
…

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation. The permittee or licensee, and the tower owner in any case in which the owner is not the permittee or licensee, shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section. In the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is a reasonable possibility that it may constitute a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

…

47 U.S.C. § 319 - Construction permits

(a) Requirements

No license shall be issued under the authority of this chapter for the operation of any station unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

(b) Time limitation; forfeiture

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

(c) Licenses for operation

Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. The provisions of section 309(a)-(g) of this title shall not apply with respect to any station license the issuance of which is provided for and governed by the provisions of this subsection.

(d) Government, amateur, or mobile station; waiver

A permit for construction shall not be required for Government stations, amateur stations, or mobile stations. A permit for construction shall not be required for public coast stations, privately owned fixed microwave stations, or stations licensed to common carriers, unless the Commission determines that the public interest, convenience, and necessity would be served by

requiring such permits for any such stations. With respect to any broadcasting station, the Commission shall not have any authority to waive the requirement of a permit for construction, except that the Commission may by regulation determine that a permit shall not be required for minor changes in the facilities of authorized broadcast stations. With respect to any other station or class of stations, the Commission shall not waive the requirement for a construction permit unless the Commission determines that the public interest, convenience, and necessity would be served by such a waiver.

47 U.S.C. § 332 - Mobile services

…

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that--
(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
(ii) enforcement of such provision is not necessary for the protection of consumers; and
(iii) specifying such provision is consistent with the public interest.
(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.
(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--
(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.
(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall

review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:
(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.
(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
(I) shall not unreasonably discriminate among providers of functionally equivalent services; and
(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.
(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.
(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--
(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;
(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and
(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services

unless the Commission finds it to be in the public interest to apply such requirements to such services.

36 C.F.R. § 800.2 - Participants in the Section 106 process.

(a) Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.
(1) Professional standards. Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.
(2) Lead Federal agency. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.
(3) Use of contractors. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.
(4) Consultation. The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.
…

(c) Consulting parties. The following parties have consultative roles in the section 106 process.
(1) State historic preservation officer.
(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and

individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) Indian tribes and Native Hawaiian organizations.

(i) Consultation on tribal lands.

(A) Tribal historic preservation officer. For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) Tribes that have not assumed SHPO functions. When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations. Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian

organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.
(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.
(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.
(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.
(3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.
(4) Applicants for Federal assistance, permits, licenses, and other approvals. An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.
(5) Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

36 C.F.R. § 800.3 - Initiation of the section 106 process.

(a) Establish undertaking. The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.
(1) No potential to cause effects. If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) Program alternatives. If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) Coordinate with other reviews. The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) Identify the appropriate SHPO and/or THPO. As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) Tribal assumption of SHPO responsibilities. Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) Undertakings involving more than one State. If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) Conducting consultation. The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) Failure of the SHPO/THPO to respond. If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) Consultation on tribal lands. Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) Plan to involve the public. In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions,

consistent with § 800.2(d).
(f) Identify other consulting parties. In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.
(1) Involving local governments and applicants. The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).
(2) Involving Indian tribes and Native Hawaiian organizations. The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.
(3) Requests to be consulting parties. The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.
(g) Expediting consultation. A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

36 C.F.R. § 800.4 - Identification of historic properties.

(a) Determine scope of identification efforts. In consultation with the SHPO/THPO, the agency official shall:
(1) Determine and document the area of potential effects, as defined in § 800.16(d);
(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;
(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and
(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).
…

36 C.F.R. § 800.14 - Federal agency program alternatives.

…
(b) Programmatic agreements. The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution

of adverse effects from certain complex project situations or multiple undertakings.
(1) Use of programmatic agreements. A programmatic agreement may be used:
(i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;
(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;
(iii) When nonfederal parties are delegated major decisionmaking responsibilities;
(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or
(v) Where other circumstances warrant a departure from the normal section 106 process.
(2) Developing programmatic agreements for agency programs.
(i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.
(ii) Public participation. The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.
(iii) Effect. The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe, or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.
(iv) Notice. The agency official shall notify the parties with which it has consulted that a programmatic agreement has been executed under paragraph (b) of this section, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.
(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.
(3) Developing programmatic agreements for complex or multiple undertakings. Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow § 800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the agency official

shall comply with the provisions of subpart B of this part for each individual undertaking.
(4) Prototype programmatic agreements. The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area. When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.
…

36 C.F.R. § 800.16 - Definitions.

(a) Act means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470-470w-6.
(b) Agency means agency as defined in 5 U.S.C. 551.
(c) Approval of the expenditure of funds means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.
(d) Area of potential effects means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.
(e) Comment means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.
(f) Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.
(g) Council means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.
(h) Day or days means calendar days.
(i) Effect means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.
(j) Foreclosure means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.
(k) Head of the agency means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.
(l)(1) Historic property means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term eligible for inclusion in the National Register includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.
(m) Indian tribe means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
(n) Local government means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.
(o) Memorandum of agreement means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.
(p) National Historic Landmark means a historic property that the Secretary of the Interior has designated a National Historic Landmark.
(q) National Register means the National Register of Historic Places maintained by the Secretary of the Interior.
(r) National Register criteria means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).
(s)(1) Native Hawaiian organization means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.
(2) Native Hawaiian means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.
(t) Programmatic agreement means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).
(u) Secretary means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.
(v) State Historic Preservation Officer (SHPO) means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.
(w) Tribal Historic Preservation Officer (THPO) means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.
(x) Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.
(y) Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.
(z) Senior policy official means the senior policy level official designated by the head of the agency pursuant to section 3(e) of Executive Order 13287.

47 C.F.R. § 1.1307 - Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(a) Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant (see §§ 1.1308 and 1.1311) and may require further Commission environmental processing (see §§ 1.1314, 1.1315 and 1.1317):
(1) Facilities that are to be located in an officially designated wilderness area.
(2) Facilities that are to be located in an officially designated wildlife preserve.
(3) Facilities that:
(i) May affect listed threatened or endangered species or designated critical habitats; or
(ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973.

Note: The list of endangered and threatened species is contained in 50 CFR 17.11, 17.22, 222.23(a) and 227.4. The list of designated critical habitats is contained in 50 CFR 17.95, 17.96 and Part 226. To ascertain the status of proposed species and habitats, inquiries also may be directed to the Regional Director of the Fish and Wildlife Service, Department of the Interior.
(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places. (See 16 U.S.C. 470w(5); 36 CFR part 60 and 800.) To ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register of Historic Places, an applicant shall follow the procedures set forth in the rules of the Advisory Council on Historic Preservation, 36 CFR part 800, as modified and supplemented by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Appendix B to Part 1 of this Chapter, and the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, Appendix C to Part 1 of this Chapter.
(5) Facilities that may affect Indian religious sites.
(6) Facilities to be located in a flood Plain (See Executive Order 11988.)
(7) Facilities whose construction will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion). (In the case of wetlands on Federal property, see Executive Order 11990.)
(8) Antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located in residential neighborhoods, as defined by the applicable zoning law.
(b) In addition to the actions listed in paragraph (a) of this section, Commission actions granting construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities, require the preparation of an Environmental Assessment (EA) if the particular facility, operation or transmitter would cause human exposure to levels of radiofrequency radiation in excess of the limits in § 1.1310 and § 2.1093 of this chapter. Applications to the Commission for construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities must contain a statement confirming compliance with the limits unless the facility, operation, or transmitter is categorically excluded, as discussed below. Technical information showing the basis for this statement must be submitted to the Commission upon request. Such compliance statements may

be omitted from license applications for transceivers subject to the certification requirement in § 25.129 of this chapter.
(1) The appropriate exposure limits in § 1.1310 and § 2.1093 of this chapter are generally applicable to all facilities, operations and transmitters regulated by the Commission. However, a determination of compliance with the exposure limits in § 1.1310 or § 2.1093 of this chapter (routine environmental evaluation), and preparation of an EA if the limits are exceeded, is necessary only for facilities, operations and transmitters that fall into the categories listed in table 1, or those specified in paragraph (b)(2) of this section. All other facilities, operations and transmitters are categorically excluded from making such studies or preparing an EA, except as indicated in paragraphs (c) and (d) of this section. For purposes of table 1, "building-mounted antennas" means antennas mounted in or on a building structure that is occupied as a workplace or residence. The term "power" in column 2 of table 1 refers to total operating power of the transmitting operation in question in terms of effective radiated power (ERP), equivalent isotropically radiated power (EIRP), or peak envelope power (PEP), as defined in § 2.1 of this chapter. For the case of the Cellular Radiotelephone Service, subpart H of part 22 of this chapter; the Personal Communications Service, part 24 of this chapter and the Specialized Mobile Radio Service, part 90 of this chapter, the phrase "total power of all channels" in column 2 of table 1 means the sum of the ERP or EIRP of all co-located simultaneously operating transmitters owned and operated by a single licensee. When applying the criteria of table 1, radiation in all directions should be considered. For the case of transmitting facilities using sectorized transmitting antennas, applicants and licensees should apply the criteria to all transmitting channels in a given sector, noting that for a highly directional antenna there is relatively little contribution to ERP or EIRP summation for other directions.

47 C.F.R. § 1.1308 - Consideration of environmental assessments (EAs); findings of No significant impact.

(a) Applicants shall prepare EAs for actions that may have a significant environmental impact (see § 1.1307). An EA is described in detail in § 1.1311 of this part of the Commission rules.
(b) The EA is a document which shall explain the environmental consequences of the proposal and set forth sufficient analysis for the Bureau or the Commission to reach a determination that the proposal will or will not have a significant environmental effect. To assist in making that determination, the Bureau or the Commission may request further information from the applicant, interested persons, and agencies and authorities which have jurisdiction by law or which have relevant expertise.

Note.--With respect to actions specified under §§ 1.1307(a)(3) and 1.1307(a)(4), the Commission shall solicit and consider the comments of the Department of Interior, and the State Historic Preservation Officer and the Advisory Council on Historic Preservation, respectively, in accordance with their established procedures. See Interagency Cooperation--Endangered Species Act of 1973, as amended, 50 CFR Part 402; Protection of Historic and Cultural Properties, 36 CFR Part 800. In addition, when an action interferes with or adversely affects an American Indian tribe's religious site, the Commission shall solicit the views of that American Indian tribe. See § 1.1307(a)(5).
(c) If the Bureau or the Commission determines, based on an independent review of the EA and any applicable mandatory consultation requirements imposed upon federal agencies (see note

above), that the proposal will have a significant environmental impact upon the quality of the human environment, it will so inform the applicant. The applicant will then have an opportunity to amend its application so as to reduce, minimize, or eliminate environmental problems. See § 1.1309. If the environmental problem is not eliminated, the Bureau will publish in the Federal Register a Notice of Intent (see § 1.1314) that EISs will be prepared (see §§ 1.1315 and 1.1317), or

(d) If the Bureau or Commission determines, based on an independent review of the EA, and any mandatory consultation requirements imposed upon federal agencies (see the note to paragraph (b) of this section), that the proposal would not have a significant impact, it will make a finding of no significant impact. Thereafter, the application will be processed without further documentation of environmental effect. Pursuant to CEQ regulations, see 40 CFR 1501.4 and 1501.6, the applicant must provide the community notice of the Commission's finding of no significant impact.

47 C.F.R. § 1.1311 - Environmental Information to be Included in the environmental assessment (EA).

(a) The applicant shall submit an EA with each application that is subject to environmental processing (see § 1.1307). The EA shall contain the following information:

(1) For antenna towers and satellite earth stations, a description of the facilities as well as supporting structures and appurtenances, and a description of the site as well as the surrounding area and uses. If high intensity white lighting is proposed or utilized within a residential area, the EA must also address the impact of this lighting upon the residents.

(2) A statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by zoning, planning, environmental or other local, state or federal authorities on matters relating to environmental effect.

(3) A statement as to whether construction of the facilities has been a source of controversy on environmental grounds in the local community.

(4) A discussion of environmental and other considerations which led to the selection of the particular site and, if relevant, the particular facility; the nature and extent of any unavoidable adverse environmental effects, and any alternative sites or facilities which have been or might reasonably be considered.

(5) Any other information that may be requested by the Bureau or Commission.

(6) If endangered or threatened species or their critical habitats may be affected, the applicant's analysis must utilize the best scientific and commercial data available, see 50 CFR 402.14(c).

(b) The information submitted in the EA shall be factual (not argumentative or conclusory) and concise with sufficient detail to explain the environmental consequences and to enable the Commission or Bureau, after an independent review of the EA, to reach a determination concerning the proposal's environmental impact, if any. The EA shall deal specifically with any feature of the site which has special environmental significance (e.g., wilderness areas, wildlife preserves, natural migration paths for birds and other wildlife, and sites of historic, architectural, or archeological value). In the case of historically significant sites, it shall specify the effect of the facilities on any district, site, building, structure or object listed, or eligible for listing, in the National Register of Historic Places. It shall also detail any substantial change in the character of the land utilized (e.g., deforestation, water diversion, wetland fill, or other extensive change of surface features). In the case of wilderness areas, wildlife preserves, or other like areas, the

statement shall discuss the effect of any continuing pattern of human intrusion into the area (e.g., necessitated by the operation and maintenance of the facilities).
(c) The EA shall also be accompanied with evidence of site approval which has been obtained from local or federal land use authorities.
(d) To the extent that such information is submitted in another part of the application, it need not be duplicated in the EA, but adequate cross-reference to such information shall be supplied.
(e) An EA need not be submitted to the Commission if another agency of the Federal Government has assumed responsibility for determining whether of the facilities in question will have a significant effect on the quality of the human environment and, if it will, for invoking the environmental impact statement process.

47 C.F.R. § 1.1312 - Facilities for which no pre-construction authorization is required.

(a) In the case of facilities for which no Commission authorization prior to construction is required by the Commission's rules and regulations the licensee or applicant shall initially ascertain whether the proposed facility may have a significant environmental impact as defined in § 1.1307 of this part or is categorically excluded from environmental processing under § 1.1306 of this part.
(b) If a facility covered by paragraph (a) of this section may have a significant environmental impact, the information required by § 1.1311 of this part shall be submitted by the licensee or applicant and ruled on by the Commission, and environmental processing (if invoked) shall be completed, see § 1.1308 of this part, prior to the initiation of construction of the facility.
(c) If a facility covered by paragraph (a) of this section is categorically excluded from environmental processing, the licensee or applicant may proceed with construction and operation of the facility in accordance with the applicable licensing rules and procedures.
(d) If, following the initiation of construction under this section, the licensee or applicant discovers that the proposed facility may have a significant environmental effect, it shall immediately cease construction which may have that effect, and submit the information required by § 1.1311 of this part. The Commission shall rule on that submission and complete further environmental processing (if invoked), see § 1.1308 of this part, before such construction is resumed.
(e) Paragraphs (a) through (d) of this section shall not apply to the construction of mobile stations.

47 C.F.R. § 17.4 - Antenna structure registration.

(a) Effective July 1, 1996, the owner of any proposed or existing antenna structure that requires notice of proposed construction to the Federal Aviation Administration must register the structure with the Commission. This includes those structures used as part of stations licensed by the Commission for the transmission of radio energy, or to be used as part of a cable television head end system. If a Federal Government antenna structure is to be used by a Commission licensee, the structure must be registered with the Commission.
(1) For a proposed antenna structure or alteration of an existing antenna structure, the owner must register the structure prior to construction or alteration.

(2) For an existing antenna structure that had been assigned painting or lighting requirements prior to July 1, 1996, the owner must register the structure prior to July 1, 1998.
(3) For a structure that did not originally fall under the definition of "antenna structure," the owner must register the structure prior to hosting a Commission licensee.
(b) Except as provided in paragraph (e) of this section, each owner must file FCC Form 854 with the Commission. Additionally, each owner of a proposed structure referred to in paragraphs (a)(1) or (a)(3) of this section must submit a valid FAA determination of "no hazard." In order to be considered valid by the Commission, the FAA determination of "no hazard" must not have expired prior to the date on which FCC Form 854 is received by the Commission. The height of the structure will include the highest point of the structure including any obstruction lighting or lighting arrester.
(c) If an Environmental Assessment is required under § 1.1307 of this chapter, the Bureau will address the environmental concerns prior to processing the registration.
(d) If a final FAA determination of "no hazard" is not submitted along with FCC Form 854, processing of the registration may be delayed or disapproved.
(e) If the owner of the antenna structure cannot file FCC Form 854 because it is subject to a denial of federal benefits under the Anti-Drug Abuse Act of 1988, 21 U.S.C. 862, the first tenant licensee authorized to locate on the structure (excluding tenants that no longer occupy the structure) must register the structure using FCC Form 854, and provide a copy of the Antenna Structure Registration (FCC Form 854R) to the owner. The owner remains responsible for providing a copy of FCC Form 854R to all tenant licensees on the structure and for posting the registration number as required by paragraph (g) of this section.
(f) The Commission shall issue, to the registrant, FCC Form 854R, Antenna Structure Registration, which assigns a unique Antenna Structure Registration Number. The structure owner shall immediately provide a copy of Form 854R to each tenant licensee and permittee.
(g) Except as described in paragraph (h) of this section, the Antenna Structure Registration Number must be displayed in a conspicuous place so that it is readily visible near the base of the antenna structure. Materials used to display the Antenna Structure Registration Number must be weather-resistant and of sufficient size to be easily seen at the base of the antenna structure.
(h) The owner is not required to post the Antenna Structure Registration Number in cases where a federal, state, or local government entity provides written notice to the owner that such a posting would detract from the appearance of a historic landmark. In this case, the owner must make the Antenna Structure Registration Number available to representatives of the Commission, the FAA, and the general public upon reasonable demand.

47 C.F.R. § 17.7 - Antenna structures requiring notification to the FAA.

A notification to the Federal Aviation Administration is required, except as set forth in § 17.14, for any of the following construction or alteration:
(a) Any construction or alteration of more than 60.96 meters (200 feet) in height above ground level at its site.
(b) Any construction or alteration of greater height than an imaginary surface extending outward and upward at one of the following slopes:
(1) 100 to 1 for a horizontal distance of 6.10 kilometers (20,000 feet) from the nearest point of the nearest runway of each airport specified in paragraph (d) of this section with at least one runway more than 0.98 kilometers (3,200 feet) in actual length, excluding heliports.

(2) 50 to 1 for a horizontal distance of 3.05 kilometers (10,000 feet) from the nearest point of the nearest runway of each airport specified in paragraph (d) of this section with its longest runway no more than 0.98 kilometers (3,200 feet) in actual length, excluding heliports.
(3) 25 to 1 for a horizontal distance of 1.52 kilometers (5,000 feet) from the nearest point of the nearest landing and takeoff area of each heliport specified in paragraph (d) of this section.
(c) When requested by the FAA, any construction or alteration that would be in an instrument approach area (defined in the FAA standards governing instrument approach procedures) and available information indicates it might exceed an obstruction standard of the FAA.
(d) Any construction or alteration on any of the following airports (including heliports):
(1) An airport that is available for public use and is listed in the Airport Directory of the current Airman's Information Manual or in either the Alaska or Pacific Airman's Guide and Chart Supplement.
(2) An airport under construction, that is the subject of a notice or proposal on file with the Federal Aviation Administration, and except for military airports, it is clearly indicated that the airport will be available for public use.
(3) An airport that is operated by an armed force of the United States.

Note: Consideration to aeronautical facilities not in existence at the time of the filing of the application for radio facilities will be given only when proposed airport construction or improvement plans are on file with the Federal Aviation Administration as of the filing date of the application for such radio facilities.